In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 280

IRVING A. KANAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Claims's opinion (Pet. App. A. 1–8) [1] is reported at 314 F. 2d 802.

JURISDICTION

The order of the Court of Claims was entered on March 6, 1963. Petitioner's timely motion for rehearing was denied on April 17, 1964. The petition for a writ of certiorari was filed on July 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] "Pet. App." refers to the appendix to the petition for certiorari.

743-370—64

QUESTION PRESENTED

A contractor's employee was allowed compensation for the erroneous revocation of his security clearance under Department of Defense regulations. The question presented is whether the Court of Claims correctly refused to award additional compensation.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 1491 provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Paragraph 26 of Department of Defense Directive No. 5220.6, 20 Fed. Reg. 1553, 1559, dated February 2, 1955 provides:

> *Monetary restitution:* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated

for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

STATEMENT

Petitioner brought this action in the Court of Claims to recover for damages allegedly resulting when his employment with a government contractor was terminated as the result of an erroneous revocation of his security clearance.

Petitioner was employed as a research engineer with North American Aviation, Inc., when on July 12, 1954, a Department of Defense screening agency (Western Industrial Personnel Security Board) determined that his access to classified materials was "not clearly consistent with the interests of national security." Petitioner was thereafter suspended without pay. Revocation of petitioner's clearance was affirmed by the Security Board's appeal division on September 29, 1954. Nearly a year later, however, the Industrial Personnel Security Review Board reversed this ruling and declared that it was "clearly consistent with the interests of national security" to allow petitioner access to classified information (Deft.'s Exhibit 21). The Review Board authorized the responsible military commander to reissue petitioner's clearance (Deft.'s Exhibit 22). North American Aviation was informed that petitioner's eligibility for clearance had been restored, and petitioner received notice of this fact on September 21, 1955 (Deft.'s Exhibit 23).

Petitioner was unemployed when his eligibility for clearance was restored. Since a security clearance is limited to the contract facility at which the employee is working at the time that it is issued, petitioner was therefore not immediately granted a new clearance for classified materia'. On April 9, 1956, petitioner was hired by Lockheed Aircraft Corporation to perform work relating to rocket propulsion at its facility in Van Nuys, California. On January 21, 1957, while Lockheed's request for a secret clearance was being processed (Deft.'s Exhibit 18), petitioner voluntarily left this job. On April 1, 1957, petitioner was hired by Radioplane Company. Radioplane requested a secret clearance for petitioner, which was issued on February 7, 1958.

On December 29, 1955, petitioner filed an administrative claim pursuant to Department of Defense Directive 5220.6 of February 2, 1955, 20 Fed. Reg. 1553, 1559, asking $9,698.89 compensation for loss of wages between July 12, 1954, and September 21, 1955 (Deft.'s Exhibits 6 and 17).[2] On April 1, 1958, before this administrative claim had been determined, petitioner brought the present action in the Court of Claims. He claimed that, in addition to the sum asked in his administrative claim, he was entitled to damages (1) for loss of wages allegedly suffered between the time when he received notice of his eligibility for a secret clearance (September 21, 1955) and

[2] Processing of petitioner's administrative claim was delayed by the difficulty of obtaining information regarding his efforts to find other employment after North American Aviation suspended him (see Deft.'s Exhibit 17).

the time when he was actually reissued a secret clearance (February 7, 1958) and (2) for loss of professional opportunities which he attributed to revocation of his clearance.[3] These additional claims were made under the Fifth Amendment and the Tucker Act.[4]

On June 30, 1961, the Court of Claims ordered that proceedings before it be suspended until petitioner exhausted the administrative remedy available under Department of Defense Directive 5220.6. On April 19, 1962, the Department of the Air Force informed petitioner that he was entitled to $4,677.52[5] for wages

[3] Petitioner claimed $5,363 for wages lost between September 21, 1955, and April 9, 1956; $8,400 for merit and general wage increases lost between revocation of his clearance and filing of suit; $17,500 for time and experience lost in the field of rocket propulsion research between revocation and reissuance of his secret clearance; and $122,600 for loss of "the capacity to reach levels of financial recompense in both scientific and non-scientific activity consistent with his unique and highly specialized training, abilities, and experience" which he attributed to loss of clearance between July 12, 1954, and February 7, 1958 (Pet. in Ct. Cl.).

In addition, petitioner asked recovery for loss of $250 bonuses customarily awarded by North American Aviation, Inc., to employees whose inventions are patented by the company while they are on the payroll (Pet. in Ct. Cl). One of petitioner's inventions was patented by North American on August 28, 1956. Another was patented on March 29, 1960 (Pet. 7). He alleged that several others will be patented once secrecy orders placed on them are lifted (Pet. 6–7).

[4] By subsequent amendment, petitioner specified that his suit rested on Department of Defense Directive 5220.6, Article II of the Constitution, and both the "due process" and "just compensation" clauses of the Fifth Amendment to the Constitution.

[5] This amount was equal to petitioner's daily salary at the time he was suspended, $32.776, multiplied by 145 working days, minus petitioner's outside earnings of $75.

lost between July 12, 1954, the date on which North American terminated his employment, and January 29, 1955, the date on which the California State Department of Employment declared petitioner ineligible for continued unemployment benefits (Deft.'s Exhibit 32). On May 17, 1962, petitioner rejected the administrative award (Deft.'s Exhibit 33), and on August 3, 1962, proceedings were reinstated in the Court of Claims.

The Court of Claims held that a question of fact existed regarding whether petitioner had diligently sought employment between January 29, 1955, the date on which California had declared petitioner ineligible for unemployment benefits, and September 21, 1955, the end of the period covered by petitioner's administrative claim. It remanded this aspect of the case to a Commissioner for trial on that issue. The court granted the Government's motion for summary judgment as to petitioner's remaining claims, finding neither statutory nor constitutional basis for the relief sought.

ARGUMENT

1. Petitioner's contention that no valid administrative remedy was available to him rests upon an inaccurate reading of this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. The effect of *Greene* v. *McElroy* was not, as petitioner asserts, to hold Department of Defense Directive 5220.6 entirely invalid, but merely to reject that portion of the Directive providing for revocation of a contractor employee's security clearance without allowing him the right to

cross-examine witnesses upon whose testimony the revocation was based. The reimbursement provisions of the Directive were not affected. Indeed in *Greene* v. *United States*, 376 U.S. 149, the employee involved in *Greene* v. *McElroy* was held affirmatively entitled to restitution under Directive 5220.6. See also *Taylor* v. *McElroy*, 360 U.S. 709.

2. Petitioner has been tendered all of the compensation to which Directive 5220.6 entitles him (subject to possible augmentation upon the determination of a factual issue upon remand). The Directive provides that the contractor employee be reimbursed

> * * * in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. * * *

By the plain words of the Directive, petitioner was entitled only to his wages "at the rate he was receiving on the date of suspension," and not, as he contends, to increases or benefits he might have gained had his clearance not been suspended.[6] Nor can peti-

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[6] The measure of recovery basing compensation upon the wage received on the date of suspension was borrowed from that authorized by the Lloyd-Lafollette Act for government employees erroneously suspended or separated from service, 37 Stat. 555, as amended by 62 Stat. 354, 5 U.S.C. 652. See Hearings before the Subcommittee of the House Committee on Appropriations, on Department of Defense Appropriations for 1956, 84th Cong., 1st Sess., 774–781 (1955). Under this statute and another designed to compensate government employees whose service was errone-

tioner now claim compensation under the Directive for alleged losses after September 21, 1955, since he has made no administrative claim for losses beyond that date.

3. Having recovered his lost wages under Directive 5220.6, petitioner claims additional compensation totaling more than $100,000 for lost bonuses and wage increases, loss of experience in the field of rocket propulsion research, and general loss of employment opportunities allegedly resulting from the suspension of his clearance. These speculative claims—alleged to arise under the due process and just compensation clauses of the Constitution—are insubstantial. In the first place, the consequential loss of petitioner's employment was not a compensable "taking" under the Fifth Amendment. *Omnia Co.* v. *United States*, 261 U.S. 502, 508, 510; *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 236; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155. Secondly, even if the procedures by which petitioner's clearance was revoked constituted a deprivation of property without due process—an issue which has not been resolved in petitioner's favor (see *Greene* v. *McElroy*, 360 U.S. 474, 508;

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ously terminated for security reasons, Act of Aug. 26, 1950, 64 Stat. 476, as amended by 72 Stat. 432, 5 U.S.C. 22-1, no compensation is awarded for raises, *Schaller* v. *United States*, 311 F. 2d 796 (Ct. Cl.); *O'Brien* v. *United States*, 151 F. Supp. 282 (Ct. Cl.); *Leverette* v. *United States*, 142 F. Supp. 955 (Ct. Cl.), or annual leave, *Schaller* v. *United States*, *supra*; *Habicht* v. *United States*, 303 F. 2d 946 (Ct. Cl.); *Zeiger* v. *United States*, 295 F. 2d 915 (Ct. Cl), which an employee would have been entitled to had his employment continued uninterrupted, or for damages consequential to termination of his employment, *Leverette* v. *United States*, *supra*.

Cafeteria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886; *Bailey* v. *Richardson*, 341 U.S. 918, affirming by an equally divided court, 182 F. 2d 46 (C.A.D.C.))—no suit for damages against the United States would lie as a consequence of such unauthorized administrative action. *Schillinger* v. *United States*, 165 U.S. 163, 168; *Hooe* v. *United States*, 218 U.S. 322; *Basso* v. *United States*, 239 U.S. 602; *United States* v. *North American Co.*, 253 U.S. 330, 333; *Mitchell* v. *United States*, 267 U.S. 341, 345; *United States* v. *Goltra*, 312 U.S. 203, 208; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 166 fn. 12; see 70 Harv. L. Rev. 875–887.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1964.

[7] The petition does not contest the Court of Claims' rejection of petitioner's claims under 28 U.S.C. 1491 as a third-party beneficiary to the government's security agreement with North American Aviation, or for liquidated damages not sounding in tort.

U.S. GOVERNMENT PRINTING OFFICE: 1964